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No. 96-815

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GERALD D. D'AMELIA, JR.,

Petitioner,

vs.

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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11 pp

TABLE OF CONTENTS

		Page
Table of Authorities		iii
Argument		
I.	A Prosecutor's Decision Not To Prosecute Is Protected Under The Doctrine of Absolute Immunity	2
II.	There Is No "Establishment Clause Exception" To The General Rule That Prosecutors Are Immune Under § 1983 For Conduct Performed In The Course Of Performing Their Prosecutorial Duties	3
III.	The Circumstances and Motivations Of A Prosecutor Are Irrelevant In The Context of Absolute Immunity	4
IV.	The Oath/Affirmation at Issue Had A Proper and Secular Prosecutorial Purpose	5
Conclusion		8

TABLE OF AUTHORITIES

Cases:	**Page**
Atwood v. Welton, 7 Conn. 66 (1828)	6
Doe v. Philips, 81 F.3d 1204 (2d Cir. 1996)	3
Dory v. Ryan, 25 F.3d 81 (2d Cir. 1994)	5
Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995)	4
Imbler v. Pachtman, 424 U.S. 409 (1976)	2, 4, 5
Schloss v. Bouse, 876 F.2d 287 (2d Cir. 1989)	3
Scarpino v. Grossheim, 852 F. Supp. 798 (S.D. Iowa 1994)	3
Statutes/Rules:	
Fed. R. Civ. P. 43(d)	7
Fed. R. Evid. 603	7
Miscellaneous:	
Note, *A Reconsideration of the Sworn Testimony Requirement Securing Truth in the Twentieth Century*, 75 Michigan L. Rev. 1681 (1977)	6
Schreiber, Aaron, M., *The Jurisprudence of Dealing With Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches In Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 Pace L. Rev. 535 (1991)	6

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REPLY TO OPPOSITION

Respondent's opposition brief emphasizes the very narrow question this Court has been asked to decide:

> Whether the lower courts erred in creating an unprecedented Establishment Clause exception to the historical protection provided to prosecutors under the doctrine of absolute immunity.

For the reasons set forth herein and in the Petition For A Writ of Certiorari, Petitioner respectfully requests that this Petition be granted so that briefs may be submitted addressing more fully the merits of the important issues raised herein.

ARGUMENT

I. A Prosecutor's Decision Not To Prosecute Is Protected Under the Doctrine of Absolute Immunity

Both Respondent and Petitioner agree that a prosecutor's decision not to prosecute is and should be protected by absolute immunity. *See* Respondent's Brief In Opposition to Petition for A Writ of Certiorari ("Opposition") at p. 3 ("There is no question that a prosecutor's *decision* whether or not to pursue a criminal charge is protected by absolute immunity." (emphasis in original). Respondent argues, however, that "conduct performed in the context of deciding" whether or not to prosecute is *not* protected. *Id.*

In addition to being practically impossible, Respondent's contention in this regard is contrary to well-established precedent of this Court and other Circuits which unequivocally hold that prosecutors are absolutely immune from liability for all acts committed in the course of initiating and pursuing, or opting not to pursue a criminal prosecution. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). Respondent's contention amounts to differentiating, distinguishing or severing a prosecutor's *thought processes* from the *physical conduct* he engages in while carrying out those same thought processes.

In addition to having no basis in logic, this proposition is antithetical to the long line of decisions which apply the doctrine of absolute immunity to prosecutors. *See, e.g.,* decisions cited in the Petition for A Writ of Certiorari ("Petition") at 9-10, identifying specific kinds of prosecutorial conduct which have been found to be protected under the doctrine of absolute immunity.

Respondent incorrectly claims that Petitioner "insists that absolute immunity extends not only to a prosecutor's *decision,* but also to *any conduct* which the prosecutor might perform in connection with that decision." Opposition at p. 4-5 (emphasis added). Petitioner makes clear that willful misconduct *with no public function,* which serves purely personal

interests should not be protected by absolute immunity. *See* Petition at p. 12; *see also, Doe v. Phillips,* 81 F.3d 1204, 1214 (2d Cir. 1996) ("There is a difference between performing one's office, however disgracefully and offering to sell it for purely personal benefit.") (Jacobs, J., dissenting); *Schloss v. Bouse,* 876 F.2d 287, 291 (2d Cir. 1989) (offering examples of misconduct without any public function, like demanding a bribe, or sexual favors, which may not be protected by absolute immunity).

Since the prosecutorial conduct at issue was part and parcel of the public prosecutorial function and was not engaged in for personal gain, D'Amelia is entitled to absolute immunity.

II. There is No "Establishment Clause Exception" To The General Rule That Prosecutors Are Immune Under § 1983 For Conduct Performed In the Course Of Performing Their Prosecutorial Duties

Respondent argues that violations of the Establishment Clause must be treated differently than other constitutional violations. This argument, too, is fatally flawed.

In a desperate attempt to distinguish clearly indistinguishable cases, Respondent argues that prosecutors should be entitled to absolute immunity, but only if, while performing official duties, they violate constitutional rights *other than the Establishment Clause.* According to Respondent, that is because the Establishment Clause protects a *"public"* right rather than a *"personal"* right. *See* Opposition at p. 5-6 and n.3, *quoting Scarpino v. Grossheim,* 852 F. Supp. 798, 804 (S.D. Iowa 1994). But, *Scarpino* involved the issue of *qualified* immunity with respect to public officials and not absolute immunity for prosecutors. Analysis under the doctrine of qualified immunity differs markedly from the analysis under the doctrine of absolute immunity. *Scarpino* is inapplicable.

More importantly, this Court has unequivocally rejected the notion of carving out *any* exception to the general rule that prosecutors are absolutely immune under Section 1983 for all

acts, even inappropriate, misguided and/or unconstitutional acts, which are committed in the course of conducting their duties as prosecutors, even though such immunity might leave those genuinely wronged without civil redress. *Imbler v. Pachtman,* 424 U.S. 409, 431 n. 34 (1976).

The unprecedented Establishment Clause exception to absolute immunity carved out by the lower courts is in direct contradiction to this Court's pronouncements and should be rejected outright.

III. The Circumstances and Motivations Of A Prosecutor Are Irrelevant In The Context of Absolute Immunity

Respondent's colloquy with respect to the "historically recognized balancing process" by which a prosecutor "balanc[es] the State's objectives against the claimant's personal constitutional right(s)" prior to violating a defendant's constitutional rights is, frankly, perplexing. *See* Opposition at p. 6-7. Respondent appears to be contending that prosecutors who violate defendants' constitutional rights actually engage in some mental process by which they weigh the particular constitutional violation contemplated against the "interest of the state" in having that individual prosecuted or incarcerated.

Query whether the prosecutors in *Imbler v. Pachtman,* 424 U.S. 409 (1976), in which absolute prosecutorial immunity was found to apply, "balanced" the rights of the defendant against the interest of the State before engaging in the conduct alleged to have violated defendant's constitutional rights. Similarly, in *Hill v. City of New York,* 45 F.3d 653 (2d Cir. 1995), it is doubtful whether the prosecutor who allegedly unjustifiably removed defendant's children, directed her arrest without probable cause, maliciously prosecuted her, conspired to present false evidence against her, withheld exculpatory evidence from the court, and deliberately suppressed *Brady* material "balanced" defendant's rights against those of the state before engaging in those egregious, but nonetheless protected acts.

In any event, this Court has made clear that the circumstances and motivations of a prosecutor's actions are irrelevant in analyzing whether absolute immunity should apply. *See, Imbler v. Pachtman,* 424 U.S. 409, n.13 (1976) (citations omitted). *See also Dory v. Ryan,* 25 F.3d 81, 83 (2d Cir. 1994) (absolute immunity "protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, which are associated with his function as an advocate.") Circumstances and motivation are considered only when analyzing the doctrine of qualified immunity. *Id.*

As set forth more fully in the Petition, these analytical distinctions are critical to a proper analysis of whether or not absolute immunity should apply in this instance to protect Prosecutor D'Amelia. *See* Petition at pp. 11-12. Thus, Respondent's claim that "balancing is [not] *permitted* under the Establishment Clause" is of no moment. *See* Opposition at p. 7 (emphasis in original).

IV. The Oath/Affirmation at Issue Had A Proper and Secular Prosecutorial Purpose

Respondent proclaims that Prosecutor D'Amelia cannot prevail because ". . . there is no historical or practical basis for suggesting that resort to a religious exercise is in any way necessary or (intimately associated) with a prosecutor's ability to perform as an advocate." *See* Opposition at p. 8. However, when one removes the bias inherent in this mischaracterization[1] of the conduct at issue as a "religious exercise," and substitutes the phrase "an affirmation of truth in the form of an oath ending in the words 'So help me God'," the fallacy of Respondent's assertion becomes clear.

Clearly, there is in fact a "historical or practical basis" for requesting an oath or affirmation of innocence in exchange for an agreement to dismiss criminal charges, particularly in circumstances where a prosecutor is faced with serious criminal

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[1] As set forth in the petition, the conduct at issue was not a "religious exercise" since it had a proper secular, prosecutorial purpose.

charges but has doubts about whether the allegations are true, or if true, whether the evidence will support a conviction.[2]

The historical use of an oath in legal proceedings by prosecutors and judges to verify an individual's veracity is well-documented. As succinctly declared by one court:

> "A man of the most exalted virtue . . . cannot be heard . . . without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice. . . ."

Atwood v. Welton, 7 Conn. 66, 72 (1828). *See also,* Note, *A Reconsideration of The Sworn Testimony Requirement Securing Truth in the Twentieth Century,* 75 Michigan L. Rev. 1681 (1977).

Indeed, the common-law oath/affirmation is rooted in the ancient concept of *judicium dei,* or "divine judgment." As noted by Respondent, these early forms of proof included, *inter alia* compurgation, trial by ordeal, and trial in battle. *See* Opposition at p. 11; *see also,* Schreiber, Aaron, M., *The Jurisprudence of Dealing With Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches In Medieval Criminal Law, Jewish Law and the United States Supreme Court,* 11 Pace L. Rev. 535 (1991).

Currently, the Federal Rules of Civil Procedure provide that a "solemn affirmation" may be accepted in lieu of an oath

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[2] Respondent claims that there is no support in the "trial record" that D'Amelia used the oath/affirmation to ascertain whether or not Doe committed the crime. Opposition at 10. First, in keeping with the spirit of the doctrine of absolute immunity, which is to avoid trial, there was no trial. Hence, there is no "trial record" as Respondent has represented. Secondly, Respondent admits that D'Amelia made his decision not to prosecute: "After consideration of all the evidence, the issues of credibility, the inconsistencies, the position of Mr. Doe and the victim, *and* plaintiff's affirmation denying the charges. . . ." Opposition at n.8 quoting D'Amelia's Reply Affidavit to the District Court contained in the Record on Appeal, A-208. Clearly, the oath/affirmation was, in fact, used in the prosecutorial decision-making process.

which ends in the words "So help me God." Fed. R. Civ. P. 43(d); Fed. R. Evid. 603. This continued use of the oath by lawyers and judges does not, as Respondent suggests, presage a return to the medieval use of trial by ordeal. Opposition at p. 11-12.

It is significant that Doe does not claim that she is an atheist, or that she was offended by the use of the words "So help me God." Moreover, Doe was not, in fact, forced to take the oath/affirmation. In actuality, after Prosecutor D'Amelia communicated to Doe's attorney the option of swearing to her innocence at her own family's church in exchange for a dismissal of the criminal charges, Doe did not hesitate, after consulting with her attorney, to agree to do so. The option was presented by D'Amelia to Doe's attorney on or about April 30, 1993; Doe's attorney communicated Doe's agreement to accept the option by letter dated May 7, 1993. (JA-A69).

The prosecutorial acts at issue -- communicating the option for dismissal of the charges to Doe's attorney and coordinating the events agreed to by Doe which culminated in the dismissal of the charges -- were "deemed" to be coercive by the lower courts solely because of D'Amelia's role as a prosecutor. (A-14). Such a holding is contrary to this Court's repeated rulings in this area.

It is essential that the instant Petition be granted in order to reverse the lower court decisions which qualify the doctrine of absolute immunity to exclude its application completely to cases which implicate the Establishment Clause. The oath/affirmation at issue had the valid, secular prosecutorial purpose of assisting Prosecutor D'Amelia in making a determination not to pursue criminal charges. D'Amelia's conduct in this regard may have been imprudent, but there is no question that he neither possessed nor expressed any preference with respect to the nature of the oath or the location in which it was administered. It was the Complainant who suggested this resolution, and it was Doe and her attorney who agreed.

More importantly, in the context of absolute immunity, there is no basis upon which to treat an alleged violation of the Establishment Clause differently from any other constitutional right, privilege or protection. The lower Courts were wrong to do so.

Conclusion

For all the foregoing reasons, and the reasons contained in the Petition, Petitioner respectfully requests that certiorari be granted.

Dated: February 13, 1997
Goshen, New York

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